BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

ABEL ZEPEDA	)	
Claimant	)	
VS.	)	
	)	Docket No. 264,962
BILL DAVIS ROOFING and	)	
ADAME AND ASSOCIATES OF KC, LLP	)	
Respondents	)	
AND	)	
	)	
AMERICAN PROTECTION INSURANCE COMPANY	)	
and TRAVELERS INSURANCE COMPANY	)	
Insurance Carriers	)	
AND	)	
	)	
KANSAS WORKERS COMPENSATION FUND	)	

ORDER

Adame and Associates of KC, LLP (Adame and Associates) appealed the October 31, 2002 Award entered by Assistant Director Kenneth J. Hursh. The Board heard oral argument on May 6, 2003. Retired Board Member Gary M. Peterson of Topeka, Kansas, was appointed as Board Member Pro Tem to participate in this appeal.[1]

APPEARANCES

Linda Mary Neal of Overland Park, Kansas, appeared for claimant. Michelle Daum Haskins of Kansas City, Missouri, appeared for Bill Davis Roofing (Davis Roofing) and its insurance carrier, American Protection Insurance Company (American). Steven M. Johnson of Overland Park, Kansas, appeared for Adame and Associates of KC, LLP. Randall W. Schroer of Kansas City, Missouri, appeared for Travelers Insurance Company (Travelers). Derek R. Chappell of Ottawa, Kansas, appeared for the Kansas Workers Compensation Fund (Fund).

[1] On March 31, 2003, Mr. Peterson retired from the Board. But at the time of oral argument a new Board Member had not been appointed. Accordingly, Mr. Peterson was appointed as Board Member Pro Tem for this claim.

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award. In addition, the record also includes the medical reports from Dr. Anne S. Rosenthal and Dr. Lynn D. Ketchum, which were entered into the record by a written stipulation filed June 13, 2002.

ISSUES

On March 13, 2001, claimant fell from a roof and injured his right upper extremity. In the October 31, 2002 Award, Assistant Director Hursh determined that claimant was an employee of Adame and Associates at the time of the accident and that Adame and Associates had subcontracted the roofing work being performed from Davis Roofing. Accordingly, the Assistant Director awarded claimant workers compensation benefits against Davis Roofing and its insurance carrier American, as well as against Adame and Associates and its insurance carrier Travelers. In addition, the Assistant Director ordered Adame and Associates to indemnify Davis Roofing for all benefits that Davis Roofing and American paid in this claim. The Assistant Director also ruled that the issue of whether Adame and Associates had insurance coverage from Travelers for purposes of this workers compensation claim should be resolved in District Court.

Adame and Associates contends Assistant Director Hursh erred. Adame and Associates alleges (1) Davis Roofing did not hire that company to perform the roofing work in question but, instead, Davis Roofing hired Adame and Associates' owner, Alfredo Adame, to perform the work and, consequently, the company should not be liable in this claim as either an employer or a subcontractor, (2) Davis Roofing did not act as a general contractor but, instead, acted as an employer and, therefore, claimant should be treated as a Davis Roofing employee, (3) the evidence failed to prove that claimant was an employee of Adame and Associates at the time of the accident, and (4) claimant failed to implead Alfredo Adame, personally, or another one of his companies, Double A Roofing, Inc., and, thus, claimant is proceeding against the wrong entity in this claim. In short, Adame and Associates requests this Board to absolve it of any liability in this claim.

Travelers also contends Assistant Director Hursh erred. Travelers argues that the record is uncontradicted that on the date of accident it was not providing Adame and Associates or Mr. and Mrs. Adame, personally, with workers compensation insurance coverage that would pertain to this claim. Travelers also argues that the Assistant Director erred in not addressing the insurance coverage issue. Consequently, Travelers requests the Board to find that it has no liability in this claim.

On the other hand, Davis Roofing and American contend the Award should be affirmed. They argue (1) the Board should not consider the exhibits attached to Adame and

Associates' brief to the Board that are not part of the record, (2) Adame and Associates should not be permitted to raise the issue that claimant proceeded against the wrong entity or company as that issue was not raised to the administrative law judge and, therefore, the issue is being raised for the first time on this appeal, and (3) the evidence establishes that claimant was an employee of Adame and Associates at the time of the accident.

The Assistant Director did not address the Fund's liability in this claim. Accordingly, the Fund did not address any specific issue in its letter to this Board and, instead, merely attached its submission letter that it presented to the Assistant Director. In that submission letter, the Fund, citing K.S.A. 44-503, requested the Assistant Director to assess liability against Davis Roofing and its insurance carrier due to the principal-subcontractor relationship that existed between Davis Roofing and Adame and Associates at the time of the accident.

Likewise, claimant did not file a brief with the Board for purposes of this appeal.

The issues before the Board on this appeal are:

1. Should exhibits that were attached to Adame and Associates' brief to the Board be considered when they were neither offered into evidence at any hearing or deposition, nor entered into evidence by stipulation or agreement?

2. Who was claimant's immediate employer at the time of the accident and was that employer a subcontractor of Davis Roofing?

3. Should the Division of Workers Compensation determine whether Travelers provided workers compensation insurance coverage for Adame and Associates for purposes of this claim? If so, did it?

4. Which employer, subcontractor or general contractor is liable for claimant's March 2001 accident?

FINDINGS OF FACT

After reviewing the entire record, the Board finds:

1. On March 13, 2001, claimant injured his right upper extremity when he fell from a roof. The accident occurred in Mission Hills, Kansas. There is no dispute that claimant's accident arose out of and in the course of his employment.

2. Claimant was recruited to perform that work by an individual, Efraen Elmanza, who represented that he worked for Alfredo Adame, who does business with his wife,

Glenda Adame, as Adame and Associates of KC, LLP, and who also owns and operates Double A Roofing, Inc. For the work that claimant performed with Mr. Elmanza, claimant was paid in cash by Mr. Elmanza, who, in turn, had been paid by Mr. Adame. Following the accident, Mrs. Adame provided claimant's sister-in-law with an insurance policy number that claimant could use when seeking medical treatment. Mr. Adame and his wife also paid some of the medical bills that claimant incurred due to this accident.

3. At the time of the accident, claimant was performing roofing work on a house for which Davis Roofing was ultimately responsible. Davis Roofing is a company owned and operated by Bill Davis. Davis Roofing provided most, if not all, of the materials for the job. But Mr. Adame also provided some of the boards that claimant used while shingling. Davis Roofing paid Mr. Adame for the roofing work that claimant and his coworkers performed. Out of that money, Mr. Adame kept approximately $10 per square of shingles before paying Mr. Elmanza from $75 to $80 per square.

4. Claimant was injured on the second house that Mr. Adame had agreed to roof for Davis Roofing. When Bill Davis paid Mr. Adame for that work, Mr. Adame directed Mr. Davis to write the checks to Double A Roofing. But when Mr. Davis first spoke with Mr. Adame regarding these two jobs, no particular company was mentioned as to whom would be responsible for doing the work. Mr. Davis testified, in part:

> Q. (Mr. Johnson) So Adame and Associates of KC, LLP had nothing to do with this job; is that correct?
>
> A. (Mr. Davis) No, that is not correct. I found out later they use multiple names in their business. I have learned after the fact that they go by Adame and Associates and Double A Roofing and Rubin Diaz.
>
> Q. But in your mind you hired Double A Roofing to do the job?
>
> A. I hired Alfredo Amond *[sic]* or whatever his name is to do the work.
>
> Q. Did you hire Double A Roofing, Inc. to do the job?
>
> A. I hired Amond *[sic]*.
>
> Q. Yes or no please. Double A Roofing, Inc., did you hire them to do the job yes or no?
>
> A. No.

Q. But you wrote a check to Double A Roofing, Inc. for doing the job?

A. Yes. Because it's all the same person.[2]

Moreover, Glenda Adame testified that her accountant had instructed the Adames to deposit all the monies paid to her husband into the Double A Roofing's bank account, who should then pay Adame and Associates, who should then pay its workers.

5. Mrs. Adame, who does the bookkeeping for her husband and helps him with the companies in other ways, also testified that Adame and Associates did roofing work and Double A Roofing, Inc., did cleanup work. Mrs. Adame also established that Adame and Associates was initially registered with the Missouri Secretary of State as a limited liability partnership but its registration had lapsed. In place of Adame and Associates, Mr. and Mrs. Adame created AGA LLP, which is registered in Kansas.

6. When claimant's accident occurred, Mrs. Adame believed that Adame and Associates had workers compensation insurance coverage from Travelers for accidents that occurred in either Missouri or Kansas. The parties entered into evidence the application for workers compensation insurance that Adame and Associates submitted to Travelers, which was signed by Mrs. Adame and dated May 18, 2000. The application indicated that Adame and Associates was a Missouri roofing company with no employees and who utilized no subcontractors in its operations. The application also indicated that it was applying for Missouri workers compensation insurance coverage.

7. According to a March 13, 2001 certificate of liability insurance, on the date of accident Glenda and Alfredo Adame doing business as Adame and Associates of KC had workers compensation insurance coverage through Travelers for the coverage period from May 20, 2000, to May 20, 2001. According to a March 22, 2001 certificate of liability insurance, Double A Roofing, Inc., had workers compensation insurance coverage through Travelers for the coverage period from March 16, 2001, to March 16, 2002.

8. Janice L. Stearnman, a team coordinator employed by Travelers in its underwriting department, testified that the workers compensation insurance coverage that Glenda and Alfredo Adame doing business as Adame and Associates acquired from Travelers for the period from May 20, 2000, to May 20, 2001, did not cover

[2] Davis Depo. at 14-15.

claimant's March 2001 accident as the policy was limited in scope and primarily provided coverage for Missouri workers compensation claims and employees who worked primarily in that state.

CONCLUSIONS OF LAW

The parties do not dispute the Assistant Director's finding regarding the nature and extent of claimant's injury and disability or the amount of benefits paid or awarded. Accordingly, the Board adopts those findings and conclusions as set forth in the Award. The principal issue in this claim is who is responsible.

Considering the entire record, the Board finds and concludes that claimant was an employee of Adame and Associates at the time of the March 2001 accident. The Board also concludes that Adame and Associates had contracted with Davis Roofing to perform the work that claimant was performing at the time of the accident. Those conclusions are based upon the facts that Mr. Adame met with Mr. Davis to bid on the roofing work that claimant was performing at the time of the accident and that Mr. Adame performed his roofing services through the entity of Adame and Associates.

The Board also concludes that at the time of claimant's accident Adame and Associates was performing work as a subcontractor for Davis Roofing, who should be considered a contractor or principal under K.S.A. 44-503 for purposes of this claim.

When the relationship of contractor-subcontractor exists, the Workers Compensation Act provides that an injured worker may proceed against either his or her immediate employer (the subcontractor) or against the contractor or principal. K.S.A. 44-503 provides:

> (a) Where any person (in this section referred to as principal) undertakes to execute any work which is a part of the principal's trade or business or which the principal has contracted to perform and contracts with any other person (in this section referred to as the contractor) for the execution by or under the contractor of the whole or any part of the work undertaken by the principal, the principal shall be liable to pay to any worker employed in the execution of the work any compensation under the workers compensation act which the principal would have been liable to pay if that worker had been immediately employed by the principal; and where compensation is claimed from or proceedings are taken against the principal, then in the application of the workers compensation act, references to the principal shall be substituted for references to the employer, except that the amount of compensation shall be calculated with reference to the earnings of the worker under the employer by whom the worker is immediately employed. For the purposes of this subsection, a worker shall not include an individual who is a self-employed subcontractor.

(b) Where the principal is liable to pay compensation under this section, the principal shall be entitled to indemnity from any person who would have been liable to pay compensation to the worker independently of this section, and shall have a cause of action under the workers compensation act for indemnification.

(c) Nothing in this section shall be construed as preventing a worker from recovering compensation under the workers compensation act from the contractor instead of the principal.

(d) This section shall not apply to any case where the accident occurred elsewhere than on, in or about the premises on which the principal has undertaken to execute work or which are otherwise under the principal's control or management, or on, in or about the execution of such work under the principal's control or management.

(e) A principal contractor, when sued by a worker of a subcontractor, shall have the right to implead the subcontractor.

(f) The principal contractor who pays compensation to a worker of a subcontractor shall have the right to recover over against the subcontractor in the action under the workers compensation act if the subcontractor has been impleaded.

(g) Notwithstanding any other provision of this section, in any case where the contractor (1) is an employer who employs employees in an employment to which the act is applicable, or has filed a written statement of election with the director to accept the provisions of the workers compensation act pursuant to subsection (b) of K.S.A. 44-505, and amendments thereto, to the extent of such election, and (2) has secured the payment of compensation as required by K.S.A. 44-532, and amendments thereto, for all persons for whom the contractor is required to or elects to secure such compensation, as evidenced by a current certificate of workers compensation insurance, by a certification from the director that the contractor is currently qualified as a self-insurer under that statute, or by a certification from the commissioner of insurance that the contractor is maintaining a membership in a qualified group-funded workers compensation pool, then, the principal shall not be liable for any compensation under this or any other section of the workers compensation act for any person for which the contractor has secured the payment of compensation which the principal would otherwise be liable for under this section and such person shall have no right to file a claim against or otherwise proceed against the principal for compensation under this or any other section of the workers compensation act. In the event that the payment of compensation is not secured or is otherwise unavailable or in effect, then the principal shall be liable for the payment of compensation. No insurance company shall charge a principal a premium for workers compensation insurance for any liability for which the contractor has secured the payment of compensation.

That statute, however, prohibits injured workers from proceeding against the principal when the subcontractor has the appropriate workers compensation insurance. Accordingly, the Division of Workers Compensation must determine insurance coverage issues when a worker is pursuing benefits under K.S.A. 44-503 against a principal or contractor. And based upon the uncontradicted testimony of Ms. Stearnman, the Board concludes that Adame and Associates did not have workers compensation coverage for claimant's March 2001 accident. Therefore, claimant may proceed against the principal, Davis Roofing, for his workers compensation benefits.

As provided by K.S.A. 44-503(b) and (f), quoted above, Davis Roofing, as a principal, is entitled to indemnity from Adame and Associates.

Consequently, the benefits awarded to claimant should be entered jointly and severally against Davis Roofing and its insurance carrier and Adame and Associates. Travelers is absolved of liability in this claim.

In reaching the above findings and conclusions, the Board did not consider the documents that Adame and Associates attached to its brief to the Board that were not otherwise contained in the record before the Assistant Director. For future reference, counsel for Adame and Associates is reminded that attaching documents to a submission letter or brief is not an appropriate procedure to enter documents into the record as the documents should be introduced at a hearing or deposition, providing opposing counsel an opportunity to challenge or object. In the alternative, documents may be entered into the record by the parties' stipulation.

The Board adopts the findings and conclusions set forth in the October 31, 2002 Award to the extent they are not inconsistent with the above.

AWARD

WHEREFORE, the Board modifies the October 31, 2002 Award and awards claimant the benefits set forth below against Bill Davis Roofing and its insurance carrier, American Protection Insurance Company, and Adame and Associates of KC, LLP, jointly and severally. Further, Adame and Associates of KC, LLP, shall indemnify Bill Davis Roofing and its insurance carrier, American Protection Insurance Company, for the workers compensation benefits that they have made or will make in the future pertaining to this claim. Other than its share of the costs, Travelers Insurance Company is absolved of liability in this claim.

Abel Zepeda is granted compensation from Bill Davis Roofing and its insurance carrier, American Protection Insurance Company, and Adame and Associates of KC, LLP, jointly and severally, for a March 13, 2001 accident and resulting disability. Mr. Zepeda is

entitled to receive 14.43 weeks of temporary total disability benefits at $333.35 per week, or $4,810.24, plus 22.49 weeks of permanent partial disability benefits at $333.35 per week, or $7,497.04, for an 11.5 percent permanent partial disability, making a total award of $12,307.28, which is all due and owing less any amounts previously paid.

The Board adopts the remaining orders set forth in the Award that are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of October 2003.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Linda Mary Neal, Attorney for Claimant
Michelle Daum Haskins, Attorney for Davis Roofing and American
Steven M. Johnson, Attorney for Adame and Associates
Randall W. Schroer, Attorney for Travelers
Derek R. Chappell, Attorney for Fund
Robert H. Foerschler, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director